

RECEIVED

DOCKET # 93-253

JUL 26 1994

LAW OFFICES OF
WILLIAM J. FRANKLIN,
CHARTERED

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

1919 PENNSYLVANIA AVENUE, N.W.
SUITE 300
WASHINGTON, D.C. 20006-3404

(202) 736-2233
TELECOPIER (202) 452-8757
AND (202) 223-6739

July 26, 1994

William F. Caton
Acting Secretary,
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Via Messenger

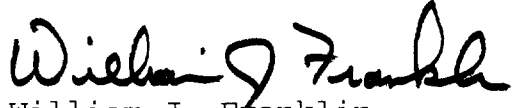
Re: **PP Docket No. 93-253**
Implementation of Section 309(j) of the
Communications Act - Competitive Bidding

Dear Mr. Caton:

Submitted herewith on behalf of the Association of Independent Designated Entities ("AIDE") are an original plus eleven copies of its Reply to Opposition to Petition for Reconsideration in the above-captioned matter.

Please direct any questions or comments concerning this submission to my office.

Respectfully submitted,



William J. Franklin
Attorney for the Association of
Independent Designated Entities

Encs.

cc: Assoc. of Independent
Designated Entities
Service List

No. of Copies rec'd _____
List ABCDE _____

0411

RECEIVED

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

JUL 26 1994

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Implementation of Section 309(j)) PP Docket No. 93-253
of the Communications Act)
)
Competitive Bidding)

To: The Commission

REPLY TO OPPOSITION TO
PETITION FOR RECONSIDERATION
OF THE ASSOCIATION OF
INDEPENDENT DESIGNATED ENTITIES
OF THE THIRD REPORT AND ORDER

The Association of Independent Designated Entities ("AIDE"), by its attorney and pursuant to Section 1.429(g) of the Commission's Rules, hereby replies to the Opposition filed by Paging Network, Inc. ("PageNet") to AIDE's Petition for Reconsideration of the Commission's Third Report and Order in the above-captioned proceeding.^{1/}

PAGENET'S OPPOSITION TO FULL-MARKET SETTLEMENTS IS CONTRARY
TO THE BUDGET ACT OF 1993.

PageNet (Opposition at 20-26) argues that the Commission correctly adopted its anti-collusion rules to preserve the integrity of the competitive bidding process and maximize govern-

^{1/} 9 FCC Rcd ____ (FCC 94-98, released May 10, 1994) ("Third R&O"). Comments were also filed by AirTouch Paging with respect to certain other Petitions for Reconsideration of the Third R&O. However, AirTouch's Comments did not address or oppose AIDE's Petition in any way.

ment revenues.^{2/} PageNet supports this argument with an extensive analysis of the various Commission rules which prohibit collusion.

PageNet's argument, and the Commission's rules for that matter, have little weight in this matter.^{3/} As AIDE's Petition demonstrated, Congress evaluated the relationship between settlements and auctions in adopting the 1993 Budget Act, and unambiguously required that the Commission continue to accept settlements of contested applications. For example, Section 309(j)(6) of the Communications Act states that:

Nothing in this subsection [309(j)], or in the use of competitive bidding, shall-

(A) Alter spectrum allocation criteria and procedures established by the other provisions of this Act;

* * *

(E) Be construed to relieve the Commission of the obligation in the public interest to continue to use ... negotiation ... and other means in order to avoid mutual exclusivity in application and licensing proceedings....

PageNet argues (Opposition at 20) that the Commission correctly limited settlements to situations in which "there are [no]

^{2/} As a threshold matter, the Commission should consider why PageNet opposes settlements. At some time in the future, PageNet and a competitor likely will file mutually exclusive paging applications, both of which could be granted by the applicants' acceptance of interference or redesign of the proposed facilities. Does PageNet really want to pay for its licenses in an auction when it (and the other applicant) both could obtain their licenses by settlement?

^{3/} As a matter of law, the Commission can only adopt rules within the scope of its authorizing legislation. Accordingly, any rules adopted by the Commission which contradict the Communications Act cannot be sustained.

mutually exclusive applicants contending in the auction process." PageNet's argument collapses under the weight of Section 309(j)(6), which explicitly considers mutually exclusivity.

PageNet further argues (Opposition at 24-25) that Section 309(j)(6) must be read as giving the Commission the authority to make the public interest determination whether settlements should be permitted. This argument is flawed.

As quoted in AIDE's Petition, the Commission previously has made the determination that all settlements are intrinsically in the public interest. There is no further determination to be made. Further, Section 309(j)(6) speaks of the Commission's "obligation in the public interest" to accept settlements. This statutory language must be twisted beyond recognition to be read (as PageNet suggests) to mean that "if the Commission determines in the public interest" to accept settlements.

**PAGENET FAILED TO POINT TO ANY COMMISSION REASONING
SUPPORTING THE LIMITATIONS WHICH IT IMPOSED ON BIDDING
PREFERENCES TO CERTAIN DESIGNATED ENTITIES FOR CERTAIN
FREQUENCIES.**

In its Petition (at 16-18), AIDE demonstrated that the Commission failed to explain its limitation on the various auction preferences to certain classes of designated entities for certain narrowband PCS frequency blocks. In response (Opposition at 17), PageNet cites its own Opposition -- no Commission reasoning -- to explain why such limitations were applied.^{4/}

^{4/} PageNet quoted ¶71 of the Third R&O, but that paragraph primarily describes the Commission's decisions without explaining (continued...)

The Administrative Procedure Act requires the Commission to explain the logic behind its rulemaking decisions. In the absence of such explanation, the decisions reached must be found arbitrary and capricious, and cannot be sustained.

CONCLUSION

Accordingly, the Association of Independent Designated Entities respectfully requests that the Commission reconsider the Third Report and Order as set forth herein and in AIDE's Petition for Reconsideration.

Respectfully Submitted,

**ASSOCIATION OF INDEPENDENT
DESIGNATED ENTITIES**

By: William J. Franklin
William J. Franklin
Its Attorney

WILLIAM J. FRANKLIN, CHARTERED
1919 Pennsylvania Avenue, N.W.
Suite 300
Washington, D.C. 20006-3404
(202) 736-2233
(202) 452-8757 (Telecopier)

^{4/} (...continued)
why such decisions were reached. To the extent that the paragraph contains an explanation, it is inconsistent with other parts of the Third R&O. See AIDE Petition at 17 & n.34.

CERTIFICATE OF SERVICE

I, Andrea Kyle, a secretary in the law firm of William J. Franklin, Chartered, hereby certify that a copy of the foregoing Reply of the Association of Independent Designated Entities to Oppositions to Petitions for Reconsideration was mailed, first-class postage prepaid, this 26th day of July, 1994, to each of the following parties:

Judith St. Ledger-Roty
J. Laurent Scharff
REED SMITH SHAW & McCLAY
1200 18th Street, N.W.
Washington, DC 20036

Carl W. Northrop
E. Ashton Johnston
BRYAN CAVE
700 13th Street, N.W.
Suite 700
Washington, D.C. 20005-3960

_____/S/
Andrea Kyle